

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES MCHENRY and
R. JAMES MATYAS

v.

BELL ATLANTIC CORPORATION and
CELLCO PARTNERSHIP d/b/a
BELL ATLANTIC MOBILE

CIVIL ACTION

NO. 97-6556

MEMORANDUM

Broderick, J.

May 17, 1999

In this action brought by Plaintiffs James McHenry and R. James Matyas on behalf of a class of employees and former employees of Defendants Bell Atlantic Corporation ("Bell Atlantic") and CellCo Partnership d/b/a Bell Atlantic Mobile Systems ("BAMS") (collectively "Defendants"), Plaintiffs make one claim of breach of fiduciary duty under sections 404 and 502 of ERISA, 29 U.S.C. §§ 1104 and 1132(a) (Count One), as well as a federal common law claim of equitable estoppel (Count Two). A further claim of breach of fiduciary duty (Count Three) has been dropped pursuant to a stipulation of the parties.

On August 18, 1998, this Court certified the following class as to Counts One and Two:

All employees of Bell Atlantic Mobile who were formerly employed by Bell Atlantic Corporation and to whom representations were made by the management of Bell Atlantic Corporation, acting in its own name and through the management of its wholly-owned subsidiary,

Bell Atlantic Mobile, that the employees' pension benefits would remain the same if they transferred their employment to Bell Atlantic Mobile.

Presently before the Court are two motions by the Defendants, one for summary judgment against the two named plaintiffs, and the other to decertify the class. Because the issues in these motions are interrelated, the Court will address them in the same opinion. For the reasons stated below, the Defendants' motions for summary judgment against the two named plaintiffs and to decertify the class will be denied.

The facts about which there are no genuine issues, as disclosed by the admissible exhibits, depositions and affidavits submitted in connection with these motions, are summarized as follows:

Transferees from Bell Atlantic to BAMS

Bell Atlantic Mobile Systems ("BAMS") was created as a subsidiary of Bell Atlantic in 1984. On January 1, 1985, the Bell Atlantic Enterprises Retirement Plan ("BAERP") was created for employees of Bell Atlantic's "enterprise," or non-regulated companies, including BAMS. BAERP was a defined benefit pension plan in which a participant received a defined monthly benefit based on age, years of service and compensation history. The benefits offered to BAMS employees through BAERP were the same as

those offered to non-union employees of Bell Atlantic's "land-line," or regulated businesses through the Bell Atlantic Management Pension Plan ("BAMPP").

Many BAMS employees were former Bell Atlantic employees who transferred to BAMS either of their own initiative or after having been recruited. Many of the Bell Atlantic employees who were considering a transfer to BAMS asked the hiring managers who interviewed them whether or not their pensions would be affected by transferring from Bell Atlantic to BAMS. Many transferees were told by hiring managers that their benefits would be the same at BAMS as at Bell Atlantic.

For many Bell Atlantic employees transferring to BAMS, the benefits they began receiving at BAMS at the time of their hire were the same as those they had received at Bell Atlantic. In some instances, however, the information received by transferring Bell Atlantic employees was not accurate. Some employees were transferring from union to non-union jobs, and there was no "bridging" of pension benefits between the union and the non-union plan. These employees now have two plans which, in the aggregate, will be less valuable than the single pension they would have received had they not transferred.

Until 1993, BAMS management was unaware of the bridging issue, and any union employees transferring to BAMS were misinformed when they were told that their benefits would remain

the same. In 1993, when it was discovered that employees coming from the union plan could not bridge their benefits, future transferees were informed of this fact. However, those employees who had already transferred to BAMS from the union plan were not informed.

The transferees apparently relied on the benefits information they received from the hiring managers who interviewed them or human resources representatives. As transferees from one Bell Atlantic company to another, they were not required to interview with a human resources or benefits representative as part of the hiring process. According to company practice, interviewing a prospective transferee from another Bell Atlantic company was handled by the BAMS hiring manager under whose supervision the transferee might ultimately work. Once a decision was made to extend a job offer to a prospective transferee, he or she received a form letter in which the transferee was told to direct any questions or requests for further information to the hiring manager.

Pat Hall, who served as the Pension Specialist responsible for overseeing the administration of pension plans for Bell Atlantic's non-regulated companies (including BAMS), testified that she was aware of no procedures or policies that governed the handling of pension-related inquiries by BAMS employees or prospective transferees. She believed that such inquiries would

be handled by either the Human Resources people at BAMS or the managers responsible for interviewing and hiring. Jeanne Kappel, who served as Director and later as Vice President of Human Resources, also testified that she was not aware of any relevant practice, policy, guidelines or protocol bearing on how to respond to such inquiries.

Pension Planning at BAMS

In May of 1992, BAMS acquired Metro Mobile, another cellular company. Metro Mobile had no defined benefits plan, and a lower overall cost of compensation and benefits than for BAMS employees. Bell Atlantic and BAMS management considered the need for a benefits structure at BAMS to close the gap between BAMS and the former Metro Mobile employees. They hired a consultant to perform a survey of benefits provided by other employers in the cellular business and comparable industries. In 1993 the resulting study revealed that the original BAMS employees' benefits (not including the new Metro Mobile employees) exceeded industry norms. Based in part on the results of this study, the Bell Atlantic staff with responsibility for benefits planning began looking for ways to close the gap between the former Metro Mobile and original BAMS employees, and to bring BAMS benefits in line with the fiftieth percentile of the cellular industry.

As part of this effort, BAMS management declined to

participate when, in June of 1994, Bell Atlantic decided to amend the base period used to calculate retirement benefits. One of the factors used to determine a participant's monthly retirement benefit under both the BAMPP and the BAERP plans was the average annual compensation earned during a five year "base period." Under both plans, the base period was April 1, 1979 through March 31, 1984. Effective June 27-28, 1994, Bell Atlantic changed the base period for both BAMPP and BAERP to the period January 1, 1987 through December 31, 1991. This meant that for employees whose compensation had increased in the 1980's and early 1990's, their pensions would be calculated using a higher average compensation level, having the effect of increasing a retiree's monthly pension benefit. However, employees of BAMS, while participants in BAERP, were specifically excepted from this amended base period. Employees of BAMS were also not informed that the base period had been amended for other Bell Atlantic employees.

Pension Planning for the CellCo Joint Venture

On June 30, 1994, it was publicly announced that effective July 1, 1995, BAMS and NYNEX would enter into a joint venture, creating a new entity called CellCo. Bell Atlantic would have roughly a 62% interest in CellCo, which would not be part of a group of trades or businesses under the common control of either Bell Atlantic or NYNEX.

Following that announcement, a Human Resources Integration Committee was formed with representatives of both Bell Atlantic/BAMS and NYNEX, charged with designing a benefits structure for CellCo. A September 29, 1994 memorandum from Susan McClain, responsible for pension planning at Bell Atlantic, recorded that "[t]he assignment [of the HR Integration Committee] is to design the benefits program that [Cellco] should have if it were a new company starting out with no prior benefit structures in place." Ms. McClain's memorandum concluded that "[t]here is obviously not sentiment for continuing the career average pay plan into the new company." Regarding the benefits planning that began in the fall of 1994, Gary Simko, the Director of Benefits Planning, likewise testified that the benefits package for CellCo employees would be completely new, "and that it would be competitive, meaning low cost and not look like the cost structure of an employee benefit plan offered in a traditional phone company." Mr. Simko further testified that no real consideration was ever given to the idea of continuing the existing career average defined benefits pension plan for the new joint venture. The Court's attention has not been called to any evidence indicating that the transferees were advised of the contents of Ms. McClain's memorandum of September 29, 1994 or Mr. Simko's comments that the benefits package for CellCo employees would be completely new and would not look like the cost

structure of an employee benefit plan of a traditional telephone company.

On January 5, 1995, the HR Integration Committee finalized its recommendation that the defined benefits plan would be terminated upon the commencement of the CellCo joint venture. The committee also recommended that retirement benefits would be provided at CellCo in the form of a defined contribution plan with profit sharing components. In a defined contribution plan, each employee has a separate account, into which contributions are placed on his or her behalf in a trust fund; the accounts then grow over time as a result of new contributions and investment returns. This recommendation was adopted on January 12, 1995 by the acting "board" for the CellCo joint venture.

On April 25, 1995, a form letter was sent to most BAMS employees who were being offered positions at the CellCo joint venture. These employees were required to accept CellCo's offer of employment by April 27, 1995. The following month, certain BAMS employees received form letters dated June 13 and 19, 1995, with information about the future treatment of the pension plan as to CellCo employees. These letters informed employees of certain alternatives on how they could elect receipt of accrued benefits, but the letters did not provide information about the value of these benefits, nor did it provide a general explanation as to how such valuations would be calculated.

Pension Valuations Upon the Termination of the BAMS Pension Plan

The CellCo joint venture became effective on July 1, 1995. CellCo/BAMS employees received their pension valuations between October 1995, and March 1996. During this same time frame, Bell Atlantic announced plans to restructure BAMPP, the defined benefits plan for the land-line companies. Thus, around the same time that CellCo/BAMS employees were receiving their pension valuations, the land-line employees who participated in BAMPP were also receiving theirs. Although the CellCo/BAMS employees and the land-line employees had until very recently participated in almost identical pension plans, there were disparities in their pension valuations.

One of the reasons for the disparity was that the new base period, as discussed previously, was used to calculate pension valuations for the land-line employees, but the old base period was used for CellCo/BAMS employees. Another source of the disparity lay in the use of a "transition multiplier" to enhance the valuations for the land-line participants of BAMPP. Such a transition multiplier was not used to calculate the value of BAMS employees' pensions.

By way of background, under a service-average defined benefit pension plan like the BAMPP or BAERP plans, a person who retires early (before full service pension eligibility) will suffer a large loss of benefits, because a significant amount of

a participant's pension valuation is built up in the very last years before full service pension eligibility. This rapid build-up in the final years is commonly referred to as the "hockey stick effect," because a graph showing year-by-year pension benefit growth leading up to the time of full service pension eligibility would resemble a hockey stick, with a sharp upturn near the end of the period.

The effect of restructuring BAMPP was to take away the final and most important phase of benefit accrual for participants who had not yet reached full service pension eligibility. With the restructuring of BAMPP, Bell Atlantic off-set the effect of losing the "hockey stick" for land-line employees by adjusting the valuation for long service BAMPP participants through the use of a "transition multiplier" that varied from 1.0 to 3.094 depending on a person's age and years of service. The termination of the BAMS pension plan also had the effect of losing the "hockey stick" for BAMS employees who had not yet reached full pension service eligibility. However, the pension valuations for BAMS/CellCo employees were not increased by a transition multiplier.

Plaintiffs claim that if correct and complete pension information had been disclosed to them on a timely basis, they either would never have transferred to BAMS or they would have transferred to other Bell Atlantic companies. Had they never

transferred, or had they transferred back to a Bell Atlantic company, Plaintiffs would have been able to both preserve continuous and uninterrupted service as a Bell Atlantic employee for purposes of pension benefits, and they would have been able to take advantage of the new base period and the transition multiplier in the calculation of their pension valuations. However, at some time (the exact date is in dispute), BAMS employees who took positions at CellCo could no longer transfer back to another Bell Atlantic company in order to take advantage of these benefits.

James McHenry

James McHenry is one of the two named Plaintiffs in this class action. Mr. McHenry began his career with AT&T Landlines in 1969, and joined Bell Atlantic upon the breakup of AT&T in 1984. Aside from a short period of time in 1986 and 1987, Mr. McHenry was a union-represented employee for the first twenty years of his career. In late spring of 1989, he was contacted by David Heverling, a second-level manager at BAMS who was a former land-line manager for whom McHenry had previously worked. Mr. Heverling recruited McHenry to work for his organization at BAMS in a management position, with management benefits.

Mr. McHenry testified that his first question upon being recruited was "[A]m I going to lose anything in this as far as the pension goes by going over [to BAMS]? Dave, I have 20

years of service, how is this going to impact pensions, my pension?" According to Mr. McHenry's testimony, Mr. Heverling assured him that his pension benefits would not be adversely affected by transferring to BAMS. Mr. McHenry understood this to mean that his benefits under the union plan would be fully bridged.

Mr. McHenry did not make direct inquiries about his pension to managers or specialists in the Human Resources or Benefits departments, nor to his union representatives. According to Mr. McHenry's testimony, he believed, based on his own experience at Bell Atlantic, that managers such as Mr. Heverling had correct information regarding pensions, because employees at Bell Atlantic customarily relied upon their managers for such information.

After Mr. McHenry accepted a position at BAMS, but before starting work there, he was contacted by a representative of the human resources department. The HR representative confirmed Mr. Heverling's information regarding his pension, and told Mr. McHenry that the plans were the same and that there was "no problem." Later, at Mr. McHenry's BAMS orientation, he received a binder of benefits information, but there was nothing in the section marked pension material.

As it turned out, Mr. McHenry's union benefits were not bridged under the BAMS plan. There is nothing in the record to

suggest that anyone at Bell Atlantic or BAMS intentionally misinformed Mr. McHenry about this aspect of his transfer. However, in 1993, when the management at BAMS became aware of the bridging issue, no effort was made to identify employees such as McHenry who were inadvertently given misinformation in the past. Mr. McHenry did not learn until late 1995, after the commencement of the CellCo joint venture, that his service under the union pension plan would not be bridged. In January or February of 1996, Mr. McHenry was first informed of the actual valuation of his pension benefits.

James Matyas

James Matyas began his career in 1970 as a co-op student at Bell of Pennsylvania. At the time of his transfer to BAMS from Bell Atlantic, he was Regional Director of Network Planning for Pennsylvania and Delaware. In late 1994 or early 1995, several people at BAMS, including Don Carretta, then a Director at BAMS, initiated conversations with Mr. Matyas about transferring. At the time Mr. Matyas was speaking to Mr. Carretta about a possible transfer to BAMS in early 1995, he heard rumors about possible pension plan changes that would affect BAMS and Bell Atlantic land-line employees. Mr. Matyas testified that he asked Mr. Carretta what impact a transfer would have on his pension, and was told, "You won't be hurt by the pension, but it may get better." Mr. Carretta told Mr. Matyas that at BAMS he would have

a defined benefit pension plan, a 401(k) savings plan, and a profit-sharing plan.

According to Mr. Matyas's testimony, he did not request pension information from anyone other than Mr. Carretta because, based on his own experience as a manager, Mr. Carretta was the appropriate person from whom to obtain the information.

Mr. Matyas also testified that Mr. Carretta "basically ran his own HR department. That's the way he described it to me. So, therefore, he had to be more in tune with HR issues."

In fact, Mr. Carretta's information was not accurate on two counts. First, the BAMS pension plan would not provide benefits for his service at BAMS based on the 1987-91 base period that prevailed at Bell Atlantic. Furthermore, in January of 1995, the board of the BAMS/NYNEX venture had adopted the HR Integration Committee's recommendation to terminate the BAMS defined benefit plan, and he would not receive the benefit of a transition multiplier when his pension valuation was calculated.

Mr. Matyas transferred to BAMS on April 1, 1995. When he learned that the pension plan at BAMS was being terminated, he also believed, based on communications from upper-level management, that he could no longer transfer back to Bell Atlantic in order to reclaim his superior benefits under his old plan. Still later, Mr. Matyas learned that his pension valuation under the new plan was inferior as compared to what it would have

been if he had stayed at Bell Atlantic. In October of 1995, Mr. Matyas took a job offer at another company and left BAMS.

The Summary Judgment Motion

Rule 56 of the Federal Rules of Civil Procedure provides that a court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

The law is clear that when a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure is properly made, the non-moving party cannot rest on the mere allegations of the pleadings. Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). Rather, in order to defeat the motion for summary judgment, the non-moving party, by its own affidavits, or by depositions, answers to interrogatories or admissions on file, as stated in Fed.R.Civ.P. 56(e), "must set forth specific facts showing that there is a genuine issue for trial." The Court, in determining whether there is a genuine issue of material fact, draws all inferences in favor of the non-moving party. Country Floors v. Partnership of Gepner and Ford, 930 F.2d 1056, 1061 (3d Cir. 1991). However,

"[t]he mere existence of a scintilla of evidence" in support of the non-movant's position will not be sufficient to defeat a motion for summary judgment. Anderson, 477 U.S. at 252.

Plaintiffs' Breach of Fiduciary Duty Claims (Count One)

The Plaintiffs' first claim is that Defendants breached their fiduciary duties under ERISA. The elements of a claim of breach of fiduciary duty under ERISA are "proof of fiduciary status, misrepresentation, company knowledge of the confusion and resulting harm to the employees." In re Unisys Corp. Retiree Medical Benefit "ERISA" Litig., 57 F.3d 1255, 1265 (3d Cir. 1995), cert. denied, 517 U.S. 1103 (1996). Plaintiffs claim that Defendants breached their duty to Mr. Matyas when Mr. Carretta represented that his benefits would remain the same or get better, when in fact, as heretofore discussed, in September of 1994 the HR Integration Committee had already decided to terminate the defined benefit pension plan upon the commencement of CellCo. Plaintiffs claim that information regarding the way his pension valuation would be calculated was material information which Mr. Matyas needed in deciding to accept a position at BAMS, as well as in deciding to stay at BAMS/CellCo, rather than transferring back to a job at Bell Atlantic.

Plaintiffs claim that Defendants breached their duty to Mr. McHenry first through representations of benefits parity at the

time he transferred to BAMS, when in fact his benefits were not actually the same due to the lack of bridging between the union and non-union plans. Plaintiffs claim that Defendants continued to breach their duty to Mr. McHenry when in 1993 they discovered the bridging issue and did not inform him of the consequences for his pension. Plaintiffs also claim that Defendants continued to breach their duty to Mr. McHenry when they failed to inform him of upcoming changes in the BAMS pension plan, first regarding the change in the "base period," and then later through failing to affirmatively inform him of the September 1994 decision to terminate the defined benefit plan, as well as the method which would be used to calculate his pension valuation. Plaintiffs claim that the information withheld by Defendants was material information needed by Mr. McHenry while he still had an option to return to a job at Bell Atlantic where his pension would be unaffected by the termination of the BAMS pension plan.

Whether Hiring Managers Were Agents of Fiduciaries

Defendants argue that they are entitled to summary judgment as to Count One, breach of fiduciary duty, because they claim that any hiring managers who made representations of benefits parity were not acting in a fiduciary capacity. In Taylor v. Peoples Natural Gas Co., 49 F.3d 982 (3d Cir. 1995), the Third

Circuit held that the fiduciaries could be liable for the misrepresentations of a non-fiduciary agent under the common law doctrine of apparent authority, id. at 988-89, and cited the Restatement (Second) of Agency § 8 cmts. a & c (1958):

It is well settled that apparent authority (1) "results from a manifestation by a person that another is his agent" and (2) "exists only to the extent that it is reasonable for the third person dealing with the agent to believe that the agent is authorized."

Plaintiffs have come forward with evidence which raises genuine issues of material fact regarding whether the hiring managers acted as the agents of the Defendant fiduciaries. There are genuine issues regarding the Defendants' procedures for providing information about pension benefits, and whether or not hiring managers had authority to provide such information. There are also genuine issues regarding the reasonableness of the Plaintiffs' reliance on pension information given to them by hiring managers.

Defendants also argue that the administrators of the BAMS pension plan owed no fiduciary duties to Bell Atlantic employees who were considering transferring to BAMS but who were not yet participants in the BAMS plan. Plaintiffs have presented evidence which raises genuine issues regarding the Defendants' corporate structure and the identity of the sponsors and administrators of the pertinent pension plans. This evidence is sufficient to raise a genuine issue of material fact with regard

to the fiduciary status of employees of BAMS vis a vis prospective employees of Bell Atlantic seeking to transfer to BAMS.

Whether Defendants Breached Their Fiduciary Duties

Defendants also argue that they are entitled to summary judgment as to Count One, breach of fiduciary duty, because they claim they had no duty to affirmatively inform Plaintiffs about the changes in the BAMS defined benefits plan while Plaintiffs still had a right to transfer to another job at Bell Atlantic. In Fischer v. Philadelphia Electric Company, 994 F.2d 130 (3d Cir. 1993), the Third Circuit held that fiduciaries have a duty not to misrepresent upcoming changes in a benefits plan which are under serious consideration. Fischer involved employees who retired shortly before their employer offered an early retirement plan, or "sweetener." The company had announced that it might offer such a plan, but when the employees, considering retirement, inquired, they were told that no such plan was being considered. The Third Circuit held that while an ERISA fiduciary is "under no obligation to offer precise predictions about future changes" to its benefits plans, it is nonetheless a breach of the fiduciary's duty to make material misrepresentations of fact to a plan participant about changes in pension benefits that are under serious consideration. Id. at 135.

In another Third Circuit case, Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund, 12 F.3d 1292 (3d Cir. 1993), the Court held that "the duty to disclose material information 'is the core of a fiduciary's responsibility.'" Id. at 1300. The Third Circuit cited the Restatement (Second) of Trusts:

[The trustee] is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person.
Restatement (Second) of Trusts § 173, comment d (1959).

The Third Circuit continued:

This duty to inform is a constant thread in the relationship between beneficiary and trustee; it entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful.

Bixler at 1300. See also Unisys Corp. Retiree Medical Benefit "ERISA" Litigation, 57 F.3d 1255, 1264 (3d Cir. 1995),

(..."[W]hen a plan administrator ... fails to provide information when it knows that its failure to do so might cause harm, the plan administrator has breached its fiduciary duty to individual plan participants and beneficiaries."); Glaziers & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Securities, Inc., 93 F.3d 1171, 1181 (3d Cir. 1996) ("...[I]t is clear that circumstances known to the fiduciary can give rise to [an] affirmative obligation even absent a request by the beneficiary.")

Plaintiffs have come forward with evidence which raises genuine issues of material fact regarding whether the Defendants should have told Plaintiffs about the changes in the BAMS pension plan while they still had an opportunity to transfer to another job at Bell Atlantic. There are genuine issues regarding when changes in the BAMS pension plan were under serious consideration, and what the reasons were for making those changes. There are further issues regarding when Plaintiffs were fully informed of those changes, and when Plaintiffs lost their opportunity to transfer to another Bell Atlantic job in order to avoid any adverse effects those changes might have on their pensions. These factual issues clearly preclude summary judgment for the Defendants on Plaintiffs' breach of fiduciary duty claims.

Whether Plaintiff McHenry's Breach of Fiduciary Duty Claim is Barred by ERISA's Statute of Limitations

Finally, Defendants argue that they are entitled to summary judgment as to Count One, breach of fiduciary duty, because they claim that Mr. McHenry's breach of fiduciary duty claim is time barred under the ERISA statute of limitations which requires suit within six years of the "last action which constituted a part of the breach or violation." 29 U.S.C. § 1113(1)(A). As heretofore discussed, Plaintiffs have presented evidence which raises

genuine issues regarding when changes to the BAMS pension plan were under serious consideration, when Plaintiffs were informed of those changes, and when they lost their opportunity to transfer to another job in order to avoid the adverse effects of those changes. Plaintiffs have presented evidence which raises the possibility that Defendants breached their on-going fiduciary duties at least in 1994. Thus, Plaintiffs have created a genuine issue of material fact about when the "last action which constituted a part of the breach or violation" occurred, and thus whether or not Plaintiff McHenry's breach of fiduciary duty claim is time-barred.

Plaintiffs' Estoppel Claims (Count Two)

Plaintiffs' second claim is that Defendants recruited Plaintiffs to work at BAMS with representations of pension parity upon which the Plaintiffs relied, and that Defendants should now be estopped from denying those representations. The elements of an estoppel claim under ERISA are 1) a material representation, 2) reasonable and detrimental reliance upon the representation, and 3) extraordinary circumstances. Curcio v. John Hancock Mutual Life Insurance Company, 33 F.3d 226, 235 (3d Cir. 1994).

Whether There are "Extraordinary Circumstances"

Defendants argue that they are entitled to summary judgment

as to Count Two, equitable estoppel, because they claim that the named Plaintiffs have failed to raise a genuine issue of material fact regarding the "extraordinary circumstances" element of estoppel under ERISA. The Third Circuit has held that a plaintiff "must do more than merely make out the 'ordinary elements' of equitable estoppel to establish a claim for equitable estoppel under ERISA." Kurz v. Philadelphia Electric Co., 96 F.3d ___, 1553 (3d Cir. 1996). Specifically, an equitable estoppel claim requires a showing of "extraordinary circumstances," such as a showing of "affirmative acts of fraud or similarly inequitable conduct by an employer." Id. In Kurz, the Court also noted that "extraordinary circumstances" have been found based on "misrepresentations that arise[] over an extended course of dealings between parties," or "the vulnerability of particular plaintiffs." Id.

Plaintiffs have come forward with evidence which raises genuine issues regarding the existence of the sort of extraordinary circumstances required for an estoppel claim. Specifically, Plaintiffs have presented evidence raising genuine issues regarding the length of time that Defendants were considering changes in the BAMS pension plan. Plaintiffs have further presented evidence raising genuine issues regarding whether, to what extent, and why Defendants withheld information from Plaintiffs about the effects those changes would have on

their pensions. This evidence creates genuine issues of material fact regarding the element of "extraordinary circumstances" in Plaintiffs' estoppel claim.

Which Statute of Limitations Applies to Plaintiffs' Estoppel Claim

Finally, Defendants argue that they are entitled to summary judgment on Count Two, equitable estoppel, because they claim that Plaintiffs' estoppel claim is time barred. Defendants argue that Plaintiffs' estoppel claim is governed by a two year statute of limitations borrowed from Pennsylvania tort law, rather than the four year contract statute.

ERISA does not contain a limitations period for an estoppel claim, so the Court must "borrow a limitations period applicable to the forum state claims most analogous to the ERISA claim at hand." Gluck v. Unisys Corp., 960 F.2d 1168, 1179, 80 (3d Cir. 1992). The substantive claim of estoppel is established under ERISA where "a representation of fact [is] made to a party who relies thereon with the right to so rely," such that the representation "may not be denied by the party making the representation if such denial would result in injury or damage to the relying party." Rosen v. Hotel & Restaurant Employees & Bartenders Union, 637 F.2d 592, 597 (3d Cir. 1981), quoting 1 S. Williston, Williston on Contracts, § 139, at 600 (3d. Ed. 1957).

Pennsylvania law is clear that estoppel claims sound in contract, and that the four-year statute provided in 42 Pa.C.S.A. § 5525(4) and (8) for "an action upon a contract implied in law" or other contractual undertaking provides the applicable limitations period. See Crouse v. Cyclops Industries, 704 A.2d 1090, 1093 (Pa. Super. 1997) ("promissory estoppel falls under the umbrella of contract law").

It is likewise clear that an estoppel claim under ERISA sounds in contract, and that Plaintiffs have raised genuine issues of material fact concerning an estoppel claim. Plaintiffs have presented evidence which raises genuine issues regarding when their estoppel claims accrued. The evidence presented by Plaintiffs raises the possibility that the estoppel claims did not accrue until at least September of 1994, or even as late as sometime 1995 or 1996, when Plaintiffs claim they were first notified that their pensions had not remained the same. This action was filed in October of 1997, and therefore Plaintiffs have clearly created a genuine issue of material fact regarding the timeliness of their estoppel claims.

For the reasons stated above, the Defendants' motion for summary judgment as to the two named Plaintiffs will be denied.

The Motion to Decertify the Class

Rule 23(c)(1) provides that a certification order "may be

conditional, and may be altered or amended before a decision on the merits." Fed.R.Civ.P. 23(c)(1). Once a class is certified, the court must continue to scrutinize and reassess the class ruling as the facts of the case are developed through discovery. Barnes v. American Tobacco Co., 161 F.3d 127, 140 (3d Cir. 1998). "[T]he district court is charged with the duty of monitoring its class decisions in light of the evidentiary development of the case. The district judge must define, redefine, subclass, and decertify as appropriate in response to the progression of the case from assertion to facts." Id. (quoting Richardson v. Byrd, 709 F.2d 1016, 1019 (5th Cir.), cert denied, 464 U.S. 1009 (1983)). Certification must be withdrawn if Rule 23 requirements are not met.

Plaintiffs bear the burden of proving that this action satisfies all of the certification requirements of Rule 23. Georgine v. Amchem Prod., Inc., 83 F.3d 610, 624 (3d Cir. 1996), aff'd sub. nom. Amchem Prods. v. Windsor, 117 S.Ct. 2231 (1997). In determining whether the class should be decertified, the Court will examine Federal Rule of Civil Procedure 23(a). Fed.R.Civ.P. 23(a) establishes four prerequisites to a class action: (1) the class must be so numerous that joinder of all members is impracticable; (2) there must be questions of law or fact common to the class; (3) the claims of the representative parties must be typical of the claims of the class; and (4) the representative

parties must fairly and adequately protect the interests of the class. Fed.R.Civ.P. 23(a). In order to establish that class certification is proper, Plaintiffs must establish that all four requisites of Rule 23(a) are met. Baby Neal for and by Kanter v. Casey, 43 F.3d 48, 55 (3d Cir. 1994). In addition, a class must comply with one of the parts of Rule 23(b). Id. at 55-56.

In their motion to decertify the class, the Defendants have not contested that the representative parties can fairly and adequately protect the interests of the class, as required by Fed.R.Civ.P. 23(a). Therefore, the Court will address the remaining three elements of Rule 23(a), in order to determine whether the Plaintiffs have established that the remaining three elements of Rule 23 are met.

The first requirement of Rule 23(a) is that the class be so numerous that joinder of the class would be impracticable. However, "'impracticable does not mean 'impossible.' The representatives of the proposed class need only show that it is extremely difficult or inconvenient to join all members of the class." Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1762 at 159. Furthermore, the Third Circuit has noted that the numerosity requirement should not be rigorously applied in cases where injunctive relief is requested. Weiss v. York Hospital, 745 F.2d 786, 808 (3d Cir. 1984).

At the time the Court originally certified the plaintiff

class, the Plaintiffs estimated that the proposed class contained at least 250 members of former Bell Atlantic employees who moved to BAMS and to whom representations were made that the employees' pension benefits would remain the same if they transferred their employment to BAMS. Plaintiffs now identify 180 such transferees. The Court finds that the 180 class members readily meet the numerosity requirement of Rule 23(a). See Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1762 at 177-179 (collecting cases where joinder found impracticable when there were 200 or fewer members.)

Rule 23(a)(2) next requires that there be issues of law or fact common to the class as a whole. As the Court noted in its original certification memorandum, "[t]he commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." Baby Neal for and by Kanter v. Casey, 43 F.3d at 56. Thus, the Third Circuit has noted, the commonality requirement is "easily met." Id. Factual differences may exist among plaintiffs because they do not need to share identical claims. Id.

Plaintiffs have identified the following common legal and factual issues:

Whether defendants and their agents functioned as ERISA fiduciaries with respect to their communications about pension benefits with persons who transferred from Bell Atlantic's land-line business to BAMS before the CellCo

joint venture.

Whether Defendants breached their fiduciary duties to provide transferees with complete and accurate information about the impact of changes in their pension benefits.

Whether Defendants' misrepresentations and omissions were material.

Whether causation is based on the materiality of Defendants' omissions.

Whether Defendants knew that the information being provided or withheld might cause harm to transferees.

Whether the facts and circumstances of Defendants' conduct constitute "extraordinary circumstances" for purposes of the estoppel claim.

The Court remains satisfied that the second prong of Rule 23(a) has been met.

Next, Rule 23(a) requires that the Plaintiffs' claims are typical of those of the proposed class members. In Baby Neal, the Third Circuit noted that "cases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality requirement irrespective of the varying fact patterns underlying the individual claims ... Actions requesting declaratory and injunctive relief to remedy conduct directed at the class clearly fit this mold." Baby Neal, 43 F.3d at 58. Plaintiffs and the members of the class all challenge the same alleged course of conduct on the part of Defendants by misrepresenting and/or withholding material information concerning the changes in the transferees' pension

benefits. This alleged common course of conduct affected both Plaintiffs and the class members in the same way in that it ultimately resulted in a reduction of the pension benefits of both Plaintiffs and the class members. Therefore, the Court continues to be satisfied that the Plaintiffs are typical of the class and that the third prong of Rule 23(a) has been met.

Finally, in addition to satisfying Rule 23(a), Plaintiffs must show that one of the subsections of Rule 23(b) is met. In its certification memorandum, the Court certified the class under Rule 23(b)(2), and the Court remains satisfied that such certification is proper.

Rule 23(b)(2) provides that an action may be maintained as a class action if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed.R.Civ.P. 23(b)(2). The Third Circuit has held that "this requirement is almost automatically satisfied in actions primarily seeking injunctive relief." Baby Neal, 43 F.3d at 58, 59 (citing Weiss v. York Hospital, 745 F.2d at 811). The Third Circuit noted that what is important under Rule 23(b)(2) is that the relief sought by the named plaintiffs benefit the entire class. Id. at 59.

As the Court originally found, there is no doubt that the

requirements of Rule 23(b)(2) are satisfied in this case. The proposed class of Plaintiffs allege that the Defendants engaged in a common course of uniform misrepresentations and omissions affecting the entire class. Plaintiffs seek declaratory and injunctive relief on behalf of the entire class, and such relief, if granted, will benefit the entire class. Therefore, the Court finds that the Rule 23(b) requirement for class certification continues to be satisfied.

For the reasons stated above, the Defendants' motions for summary judgment against the named Plaintiffs and to decertify the class will be denied. An appropriate Order follows.

THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

|
JAMES MCHENRY and
R. JAMES MATYAS

CIVIL ACTION

v.

NO. 97-6556

BELL ATLANTIC CORPORATION and
CELLCO PARTNERSHIP d/b/a
BELL ATLANTIC MOBILE

O R D E R

AND NOW, this 17th day of May, 1999; Defendants having filed a motion for summary judgment against James McHenry and R. James Matyas; Defendants having also filed a motion to decertify the class; Plaintiffs having opposed both of Defendants' motions; for the reasons stated in the accompanying Memorandum of this date;

IT IS ORDERED: The Defendants' motion for summary judgment against the James McHenry and R. James Matyas is **DENIED**;

IT IS FURTHER ORDERED: The Defendants' motion to decertify the class is **DENIED**.

RAYMOND J. BRODERICK, J.